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Supreme Court of the United States

OCTOBER TERM, 1937.

No. 242.

COMPANIA ESPANOLA DE NAVEGACION MARITIMA, S. A., Owner of the Spanish Steamship "NAVEMAR",

Petitioner,

—against—

Spanish Steamship "NAVEMAR", her engines, etc., and RAFAEL CRESPO, JOSE ARANA, MANUEL FREIRE, GASPAR LOPEZ and ANTONIO SANCHEZ,

Respondents,

(No appeal was taken by them)

FERNANDO DE LOS RIOS, Ambassador of the Republic of Spain, applicant appearing through Luis Careaga, Acting Consul General of Spain at New York, and Mr. Jesse L. Rosenberg, his counsel, to intervene and vacate a final decree so that the Ambassador might appear as claimant of the Steamship "Navemar" in this suit,

Respondent in this Court.

BRIEF ON BEHALF OF PETITIONER.

T. CATESBY JONES,
D. ROGER ENGLAR,
JAMES W. RYAN.

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Benedict on Admiralty, 5th Edition, §324, at pages 393 and 394 24

Frankenstein, Internationales Privat Recht, Vol. II, page 77 37

Confiscation: Extraterritorial and Domestic, Borchard, The American Journal of International Law, Vol 31, pages 675-681 38

The Recovery of the Foreign Assets of Nationalized Russian Corporations, 39 Yale L. J. 1130 38

Wohl, Nationalization of Joint Stock Banking Corporations in Soviet Russia, 75 U. of Penn. Law Review 385 38

G. C. Cheshire on Private International Law, pages 75-78 38

Professor Charles G. Fenwick's "International Law", Second Revised Edition, 1934, D. Appleton-Century Co., New York 38, 39

Hall on International Law, 8th Edition, edited by A. Pearce Higgins, Whewell Professor of International Law of the University of Cambridge (Oxford) 1924, Sections 76 to 78, inclusive, Part II, Chapter VI, pages 301 to 307 ..... 39, 40

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Respondent in this Court.

BRIEF ON BEHALF OF PETITIONER.

Opinions Below.

The official reports of the opinions delivered in the Courts below are: *The Navemar*, 17 Fed. Supp. 647; *The Navemar*, 18 Fed. Supp. 153 (U. S. D. C., Eastern District of New York); *The Navemar*, 90 Fed. (2d) 673 (U. S. C. C. A. 2).

Jurisdiction of This Court.

On October 11, 1937, an order was filed herein, allowing certiorari, on the petition of Compania Espanola de Navegacion Maritima, S. A., Owner of the Spanish Steamship "Navemar", for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit (R. 264). The jurisdiction

of this Court is under Section 240 of the Judicial Code, as amended by the Act of February 13, 1925, U. S. Code Title 28, Section 347, under Article 3, Section 2, Clause 1 of the Constitution of the United States. The direction of the Circuit Court of Appeals that the libel be dismissed, on the ground that the District Court was without jurisdiction, is a final decree. *The Pesaro*, 255 U. S. 216, at page 217.

Statement of the Case.

The Steamship "Navemar", a vessel registered at Seville, Spain, is owned by the petitioner, a Spanish corporation. After she had discharged the cargo, which she had brought to New York from the Argentine Republic, as a common carrier while being operated for petitioner's account, a Committee of her crew, consisting of Rafael Crespo, Jose Arana, Manuel Freire, Gaspar Lopez and Antonio Sanchez, on December 2, 1936, took physical control of her (R. 169-174), and prevented the owner, the petitioner, from carrying out necessary repairs (R. 28). In that situation, petitioner filed its libel against these men as respondents *in personam* and against the vessel *in rem* (R. 4-7), to secure possession of the vessel. Process was issued and return made (R. 6).

The case was heard by the Honorable Clarence G. Galston, one of the Judges of the United States District Court for the Eastern District of New York. Mr. Hagen, one of the counsel here, appeared at the hearing and stated that he was acting for the Consul General of Spain but had not been able "to contact the Ambassador" (R. 12), and that he "would like it to appear that we do not take any part in the proceedings" (R. 12). Mr. Thomas A. McDonald was retained as counsel by the named respondents, but did not oppose the proceedings (R. 177, 221, 223-225). At the conclusion of the hearing, on December 14, 1936, the Court entered a final decree, adjudging that the petitioner was entitled to the possession of the "Navemar", and directing the Marshal to deliver the possession of the vessel to the petitioner (R. 98). On the same day the Marshal executed the final decree, by boarding the "Navemar" and assembling the crew

aboard on deck, and by reading the final decree to the crew, and by having it thereafter translated by an interpreter into Spanish. The Marshal, in the presence of the master, then informed the crew that the petitioner was in possession of the vessel, and that the master was in charge of the vessel on behalf of the petitioner (R. 99). The master recognized the petitioner as his employer (R. 15, 150), and it is undisputed that everyone aboard the "Navemar" was employed by the petitioner (R. 78).

On December 16, 1936, Mr. Jesse L. Rosenberg, a lawyer in private practice, as Proctor for Fernando de los Rios, Ambassador and Luis Careaga, Acting Consul General of the Republic of Spain (R. 102), obtained an order to show cause from Judge Galston, citing the petitioner to appear in court on the 23rd of December, 1936, to show cause why Fernando de los Rios, Ambassador of the Republic of Spain, should not be permitted to appear in the cause specially as claimant of the Steamship "Navemar", and why the decree entered on the 14th of December, 1936, should not be set aside and vacated (R. 99, 100) to permit such an appearance. At the time the order to show cause was obtained, Mr. Rosenberg presented to the court a suggestion (R. 100-102) signed by him and Luis Careaga (R. 102), in which it is alleged that the Consul General of the Republic of Spain took possession of the Steamship "Navemar" at Rosario, in the Argentine Republic, in the name of the Republic of Spain, under a decree of the Republic of Spain dated the 10th of October, 1936, whereby the said Steamship had become the property of the Government of the Republic of Spain (R. 101).

Answer to the suggestion, and exceptions and objections to the order to show cause were filed (R. 102, 103, *et seq.*). After a full hearing, Judge Galston, on a written opinion (R. 112-116)—*The Navemar*, 17 Fed. Supp. 647—entered an order, dated January 4, 1937, sustaining the exceptions, but with leave to Fernando de los Rios, Ambassador of the Republic of Spain, to present another application if he desired to do so (R. 117, 118).

On January 8, 1937, Mr. Rosenberg, proctor for Fernando de los Rios, Ambassador of the Republic of Spain, presented

to the Court a second application for intervention, accompanied by an affidavit of Luis Careaga (R. 119-127), and obtained a second order to show cause (R. 118, 119). Petitioner made return to the second order to show cause (R. 128), and filed Exceptions and Objections to the Careaga affidavit which was treated as a new suggestion (R. 129-138). With these exceptions, petitioner filed affidavits of the ship's master (R. 138-154), the Chief Steward (R. 155-161), and an affidavit of James W. Ryan (R. 163-164). On the issue thus framed, the District Court handed down its opinion (R. 165-174)—*The Navemar,* 18 Fed. Supp. 153—in which it held that the affidavit of Careaga added nothing to the position assumed by Careaga on his first application. Accordingly, the application was denied without the right to renew.

When the case reached the Circuit Court of Appeals, the appeal was limited by that Court's order of March 4, 1937, to the single question as to whether the District Court had erred in failing to grant the second application made on behalf of the Ambassador of Spain (R. 211). The Circuit Court of Appeals, however, disregarded its order of March 4, 1937 and not only reversed the order of the District Court which denied the second application of the Ambassador, but also directed that the libel be dismissed (R. 233). The case comes here for a review of the decree of the Circuit Court of Appeals.

Findings of the District Court As Dealt With By the Circuit Court of Appeals.

(1) The "Navemar" before the Committee seized the vessel in the territorial waters of the United States, was never in the possession of the Republic of Spain (R. 172).

The Circuit Court of Appeals leaves its finding on this point in some obscurity. If, as stated in its opinion (R. 231), it regarded the allegations of the suggestions as conclusive, then the allegation that the Republic of Spain took possession of the "Navemar" in the Argentine, appears to be the finding of the Circuit Court of Appeals. But the Circuit Court of Appeals seemed to have some doubt as to

the correctness of these allegations, because during its opinion (R. 232), it referred to the alleged control of the Republic of Spain as constructive possession (R. 231-232). As a make-weight at the end of its opinion, the Circuit Court of Appeals enumerated the following circumstances "as evidence of possession": (1) "While the master was at Buenos Aires, the master placed himself at the disposal of the Spanish Consul", pursuant to direct instructions by the Spanish Government. (2) The Consul at Buenos Aires made endorsements on the ship's roll and on the ship's register. (3) The master on December 7, 1936, advised the former owner of the vessel that on October 28, 1936, the Spanish Government had obtained possession, and that since that date he had been generally under orders of the Spanish Government. (4) The master signed a receipt acknowledging that the Spanish Consul had given him $300 as an advance (R. 232, 233). The Circuit Court of Appeals failed to observe, however, that during the same period the petitioner paid the wages of the crew and supplied them with provisions (R. 146, 155, 161, 223, 224).

(2) The "Navemar" was not within the sovereign domain of the Republic of Spain, nor otherwise within its possession or control. A foreign nation cannot by edict seize such property within the sovereign domain of another power and claim immunity from suit in the courts of such latter nation. (R. 173).

This finding is not challenged by the Circuit Court of Appeals except as noted under the previous heading, unless the statement in the opinion of the Circuit Court of Appeals, "that a vessel is considered, constructively at least, as a part of the territory of the sovereign whose flag she flies", (R. 231) be considered a challenge.

(3) The Steamship "Navemar" was not an armed vessel and was not a vessel in the public service of the Republic of Spain, and was not possessed by the Republic of Spain nor operated by it (R. 173, 174).

This finding is not challenged by the Circuit Court of Appeals, except as to possession as noted above.

(4) From the time of the edict of October 10, 1936, to the time of the illegal seizure by a Committee of the crew in the waters of New York harbor, the ship was manned by officers and all members of the crew in the employ of the petitioner (R. 174, 78).

This finding is not challenged except as noted above.

(5) The vessel was under charter to Linea Sud Americana, Inc. "On arrival here its cargo—wholly privately owned—was delivered to the consignees. The freight earned was collected by the master on behalf of the charterers" (R. 174).

This finding was concurred in by the Circuit Court of Appeals (R. 228).

(6) The petitioner was domiciled, so far as domiciling is possible to a corporation, in the United States, and its affairs directed and controlled by its agents residents in the United States (R. 174).

This finding is not challenged.

Specification of Assigned Errors.

1. As the only issue which was before the Circuit Court of Appeals was whether the Final Decree should be vacated to permit the Republic of Spain to intervene as claimant of the "Navemar" in the suit instituted by petitioner against the five respondents *in personam* and against the vessel *in rem*, it was a plain error to dismiss the libel, especially as such a dismissal necessitated the acceptance of the allegations of the suggestions filed on behalf of the Ambassador of Spain as conclusive.

2. The allegations contained in the suggestions were not conclusive, and, as the Department of State of the United States had declined (R. 255, 256) to make any representation to the Court, the Republic of Spain was in the same position as any other suitor. As a suitor, to establish immunity to property claimed by it, the Republic of Spain must offer evidence to prove the facts upon which it relies to establish

immunity. Hence the Circuit Court of Appeals was in error in failing to compel the Republic of Spain to establish by proof the facts upon which it relied to establish immunity.

3. A Counsul General is not a diplomatic officer of a foreign government, and whether any special authority, granted to the Consul General by an Ambassador, is sufficient to clothe the Consul General with diplomatic authority, is a question for the Political Department of the Government, and the Circuit Court of Appeals erred when, in the absence of any representation from the Political Department of the Government, it treated the Acting Consul General of Spain as if he were a diplomatic officer.

4. When a so-called "constructive possession" of the "Navemar" was all that could be shown by the Republic of Spain, such a showing was not sufficient to render a vessel immune from arrest or suit in the courts of the United States, hence the order of the Circuit Court of Appeals directing that the case be dismissed for want of jurisdiction, was erroneous.

5. The master of the "Navemar" had no authority to confer possession of the vessel on the Republic of Spain, since at all times his custody of the vessel was that of an agent of the petitioner, and such custody did not invest him with authority to transfer possession to anyone other than as authorized by the petitioner.

6. The process of the courts of the United States cannot be used by a foreign power for the purposes of making a decree of confiscation effective when the vessel against which the decree of confiscation runs has never been, after the issuance of the decree, within the territorial waters of the confiscating power.

7. The holding of the Circuit Court of Appeals that a vessel is constructively a part of the territory of the sovereign whose flag she flies, is not in accord with the modern authorities and is unsound in principle.

Argument.

The first three of the assignments deal with questions relating to the conclusiveness of the allegations of the Ambassador, and the last four to the question of immunity generally. For this reason we have divided the argument into two parts: Part I deals with the first three assignments and Part II with the last four assignments.

I.

A.

When by its order of March 4, 1937, the Circuit Court of Appeals dismissed the appeal of the Ambassador of Spain from the final decree entered by the District Court in this cause on December 14, 1936, and merely permitted an appeal from the order of the District Court refusing to allow the second application for intervention made on behalf of the Ambassador of the Republic of Spain, the only issue before the Circuit Court of Appeals was whether such a refusal constituted error on the part of the District Court. When, however, the Circuit Court of Appeals decided the case, it did not confine its decision to the sole issue which was before it, but disregarded its order of March 4, 1937, and dealt with the whole case as if the final decree of the District Court was under Review, and directed a dismissal of the libel. Apparently the Court took this action on the theory that the allegations made by the Ambassador were conclusive upon it and that it had no power to inquire into the truth or falsity of these allegations.

On February 3, 1937, a notice of appeal, by Fernando de los Rios, Ambassador of Spain, was served on proctors for the petitioner and upon Thomas A. McDonald, proctor for Manuel Freire, *et al.* (five of whom were the men named as respondents in this cause) and upon Crowell & Rouse, proctors for Robins Dry Dock & Repair Co. (R. 177), under whose libel

the vessel was under arrest at the time of the filing of this suit (R. 250). The appeal was not allowed by the District Court, and on February 3, 1937, Fernando de los Rios, Ambassador of the Republic of Spain, by Jesse L. Rosenberg, his proctor, presented, *ex parte,* to Circuit Judge Martin T. Manton, a petition for leave to appeal to the Circuit Court of Appeals from the final decree entered in the District Court on the 14th of December, 1936, and from the order of January 4, 1937, denying the first application to intervene, and from the order of February 3, 1937, denying the second application (R. 177-178). Judge Manton allowed the appeals as prayed for (R. 178). On the 11th day of February, 1937 (R. 208), petitioner herein served upon proctor for the Ambassador, notice of motion in the United States Circuit Court of Appeals for the Second Circuit in this cause, among other things (1) to vacate the order allowing an appeal from the final decree (R. 187); (2) to vacate the order allowing an appeal from the first order of the District Court declining to permit the intervention sought by the Spanish Ambassador (R. 188); (3) to vacate the order allowing an appeal from the second application for intervention (R. 188). This motion was argued by counsel for the respective parties in the United States Circuit Court of Appeals for the Second Circuit, and printed briefs were filed. On the 4th of March, 1937 (R. 210), the Circuit Court of Appeals entered an order, the pertinent parts of which are as follows:

> "Ordered that the appeal from the final decree of the United States District Court for the Eastern District of New York, entered on the 14th day of December, 1936, be and the same hereby is dismissed, and it is further
>
> Ordered that the appeal from the order of the United States District Court for the Eastern District of New York, entered on the 4th day of January, 1937, conditionally denying intervention, be and the same hereby is dismissed, and it is further
>
> Ordered that the motion to dismiss the appeal from the order of the United States District Court for the Eastern District of New York, entered on the 3rd day of February, 1937, unconditionally denying intervention, be and the same hereby is denied, * * *" (R. 210, 211).

No exception to, nor appeal from, this order has been taken by anyone.

Thereafter counsel for the petitioner received from Mr. Rosenberg and Messrs. Lynch, Hagen and Atkins, counsel for the Spanish Ambassador, a further notice of appeal, in which it was stated that they, as proctors for Luis Careaga, Acting Consul General of Spain, would apply to the Circuit Court of Appeals for an allowance of the appeal from the final decree entered on the 14th of December, 1936, and for an order directing that the notice of second appearance of Luis Careaga be included in the printed record on appeal about to be filed on behalf of Fernando de los Rios (R. 212, 213). Annexed to this notice was an affidavit of Mr. Charles W. Hagen, in which it was alleged: "The libel in this case relates at least in part to a dispute between the officers and five members of the crew of the S/S "Navemar" (R. 214). Reference is made to a treaty between Spain and the United States, Section XXIII (R. 214).* It was alleged in these papers that under the treaty, the exclusive jurisdiction of the said dispute was, lodged with the Consul of Spain. Petitioner filed an affidavit in opposition to this motion (R. 218-226), with exhibits annexed, from which it appeared that all disputes between the petitioner herein and the crew of the "Navemar", including the respondents named in the libel herein, had been finally settled by the payment of wages in full by the petitioner herein on the 16th day of December 1936 (R. 221). On the 18th day of March, 1937, the Circuit Court of Appeals entered an order denying this motion (R. 225). No exception to, nor appeal from this order has been taken by anyone.

The case came on for argument before the United States Circuit Court of Appeals on the only issue remaining before that Court viz., whether the District Court had erred in entering its order of February 3, 1937, denying the second applica-

* In its brief in opposition to the petition for a writ of certiorari, counsel for the Ambassador again advert to this subject and cite *The Belgenland*, 114 U. S. 355. But, as the District Court exercised its discretion to take jurisdiction, and no appeal was allowed from that action, we are unable to perceive the relevancy of the citation.

tion, wherein the Spanish Ambassador sought to become the claimant of the vessel and to set aside the final decree of December 14, 1936. When the Circuit Court of Appeals decided the case, however, it dealt with it as if the decree of December 14, 1936 was before it for review, and, apparently basing its conclusions upon the theory that the Court was "bound to accept the allegations of the suggestion (Affidavit of Careaga, R. 119-127) as conclusive" (R. 231), directed the District Court to dismiss the libel (R. 233). The case comes here, therefore, on a final decree of dismissal by the Circuit Court of Appeals,—*The Pesaro,* 255 U. S. 216, at page 217—notwithstanding the fact that by its own orders the Circuit Court of Appeals had confined its consideration of the case to the question whether the District Court had erred in failing to grant the Ambassador's second application to intervene.

Petitioner asked for a rehearing, which was denied (R. 250, 251).

It should be noted that the Court which directed the dismissal of the libel (R. 226), was differently constituted from the Court which on March 4, 1937, dismissed the appeal from the final decree of December 14, 1936 (R. 210) and from the Court which on March 18, 1937 (R. 225) dismissed the second motion for an appeal from that final decree.

As the only issue before the Circuit Court of Appeals was whether the District Court had erred in entering its order of February 3, 1937 (R. 175), the Circuit Court of Appeals should have confined its decision to that issue and should, at most, have directed that the Ambassador be permitted to file claim and establish, if he could, the facts set forth in the so-called suggestions and affidavit filed by him. After the claim had been filed, both parties should have been given the opportunity to offer such relevant and competent evidence as they desired. Instead of entering an order to permit this to be done, the Circuit Court of Appeals directed that the libel be dismissed, apparently on the theory that the statements contained in the allegations of the suggestions, with the two applications, were conclusive.

B.

The allegations contained in the suggestion of the Ambassador were not conclusive. As the State Department had declined to make any representation to the Court as to the ownership of the "Navemar" by the Republic of Spain, the Spanish Government was in the same position as any other suitor when it asserted that the vessel was in its possession. Hence to establish a contention that the vessel to which it proposed to file a claim as a proprietor, was immune from judicial process, the Ambassador was under the necessity of offering proof of these allegations.

The Department of State of the United States definitely declined to make any representations to the Court as to the rights, if any, of the Republic of Spain to the "Navemar" (R. 255, 256).

Notwithstanding this declination of the Political Department of the Government to assert that any of the facts relied upon by the Ambassador were true, the Circuit Court of Appeals treated the allegations of the Ambassador "as conclusive". It said: "The claim of this public control is borne out by the Ambassador's suggestion and his desire to intervene. The allegations of the suggestion we are bound to accept as conclusive" (R. 231). It is respectfully submitted that this view of the law is in direct conflict with what was held by this Court in *Ex parte Muir*, 254 U. S. 522, at page 532, where this Court said:

> "Merely *to allege* that the vessel was in the public service and *under the control* of the British Government as an admiralty transport was not enough. These were matters *which were not within the range of judicial notice* and needed to be established in an appropriate way." (Italics ours.)

The same question came before this Court in *The Pesaro*, 255 U. S. 216, where the "Pesaro", a vessel owned by the Italian Government, was sued *in rem* in the United States

District Court for the Southern District of New York, to enforce a claim for damage to cargo. The ship was arrested under the usual process issued out of the admiralty side of the court. There was a direct suggestion by the Italian Ambassador that the ship was owned by the Italian Government and was, therefore, not subject to the court's process. The libellants objected, on the ground that a direct suggestion by the Ambassador was not admissible, and that to be entertained, the suggestion must come through official channels of the United States. This objection was overruled by the District Court, whereupon the libellants appealed direct to this Court. This Court sustained the position taken by the libellants on the ground that before the Court could consider any allegation from the Italian Government, or from a representative of the Italian Government, the Ambassador or the Government must be placed "in the attitude of a suitor", and that only in cases where the United States, through official channels made a suggestion as to the foreign ownership or possession of a vessel, may the Court entertain a suggestion without proof that a vessel is owned or possessed by a foreign sovereign. In the course of its opinion, at 255 U. S. at pages 218 and 219, this Court said:

> "We come then to consider whether the court erred in sustaining the Ambassador's suggestion that the ship was not subject to its process. Apart from that suggestion, there was nothing pointing to an absence of jurisdiction. On the contrary, what was said in the libel pointed plainly to its presence. The suggestion was made directly to the court and not through any official channel of the United States. True, it was accompanied by a certificate of the Secretary of State stating that the Ambassador was the duly accredited diplomatic representative of Italy, but while that established his diplomatic status it gave no sanction to the suggestion. The terms and form of the suggestion show that the Ambassador did not intend thereby to put himself or the Italian Government in the attitude of a suitor, but only to present a respectful suggestion and invite the court to give effect to it. He called it a 'suggestion' and we think it was nothing more. In these circumstances the libellants' objection that, to be entertained, the suggestion should come through official channels of the United States was well taken. *Ex parte Muir*, 254 U. S. 522. And

see *United States* v. *Lee*, 106 U. S. 196, 209. *With the suggestion eliminated, as it should have been, there obviously was no basis for holding that the ship was not subject to the court's process.*" (Italics ours.)

In *Ex parte Muir, supra,* two methods whereby a foreign government can submit its claim for immunity are indicated, viz., (1) Through official channels of the Government of the United States, and (2) direct to the courts of the United States. At 254 U. S., page 532, this Court said:

"As of right the British Government was entitled to appear in the suit, to propound its claim to the vessel and to raise the jurisdictional question. *The Sapphire,* 11 Wall. 164, 167; *The Santissima Trinidad,* 7 Wheat. 283, 353; *Colombia* v. *Cauca Co.,* 190 U. S. 524. Or, with its sanction, its accredited and recognized representative might have appeared and have taken the same steps in its interest. *The Anne,* 3 Wheat. 435, 445-446. And, if there was objection to appearing as a suitor in a foreign court, it was open to that government to make the asserted public status and immunity of the vessel the subject of diplomatic representations to the end that, if that claim was recognized by the Executive Department of this government, it might be set forth and supported in an appropriate suggestion to the court by the Attorney General, or some law officer acting under his direction. *The Cassius,* 2 Dall. 365; *The Exchange,* 7 Cranch. 116, s. c. 16 Fed. Cas. No. 8,786; *The Pizarro,* 19 Fed. Cas. No. 11,199; *The Constitution,* L. R. 4 P. D. 39; *The Parlement Belge,* L. R. 4 P. D. 129; s. c. L. R. 5 P. D. 197.

But none of these courses was followed. The suggestion on behalf of the British Embassy was presented by private counsel appearing as *amici curiae,* and not through the usual official channels. This was a marked departure from what theretofore had been recognized as the correct practice (see cases last cited); and in our opinion the libelant's objection to it was well taken. The reasons underlying that practice are as applicable and cogent now as in the beginning, and are sufficiently indicated by observing that it makes for better international relations, conforms to diplomatic usage in other matters, accords to the Executive Department the respect rightly due to it, and tends to promote harmony of action and uniformity of decision. See *United States* v. *Lee,* 106 U. S. 196, 209. Of course, the suggestion as made could not be given the consideration and weight claimed for it."

The situation in the present case is strikingly like that in *Ex parte Muir, supra.* The suggestion on behalf of the Spanish Ambassador was presented by private counsel, and not through the usual official channels, and the suggestion consisted merely of allegations of control plus a statement that the vessel had been confiscated by the Republic of Spain. See the Suggestion (R. 100) and the Supplemental Suggestion (R. 110) filed with the first application and the Careaga affidavit filed with the order to show cause on the second application (R. 118). The allegations in fact are not as strong as in *Ex parte Muir,* because here it is not alleged that the vessel was under control of the Government "as a transport", as was the case in *Ex parte Muir,* but merely that it was "the intention of (the Spanish) Government to use said vessel for such public purpose" (R. 124).

Nor was the "Navemar" "held and used by a government for a public purpose". *Berizzi Brothers* v. *S. S. Pesaro,* 271 U. S. 562, at page 574. Indeed the "Navemar" was not "held" by any government but by private persons. She had not been used for the purpose of advancing the trade of the Spanish people—*Berizzi Brothers* v. *S. S. Pesaro,* 271 U. S. at page 574. On the contrary, she had been used for the private profit of her owners and charterers who had her in trade between the Argentine and the United States (R. 49, 169, 170, 172). The officers and crew of the vessel were not serving under any agreement with or commission from the Government of Spain; they were serving under a private agreement between the owner, the petitioner here, and themselves (R. 49). The "Navemar's" freights were not earned for the Republic of Spain; they were earned for the charterers Linea Sud Americana, Inc. who collected them from the consignees of the cargo without protest from the Representatives of the Government of Spain (R. 228).

The master of the "Navemar" said:

> "The Spanish Consul General at Buenos Aires told me, however, that he had no instructions whatever with respect to the 'Navemar' and that she should continue her voyage. He said nothing about wishing to take possession or even intending to take possession" (R. 141).

The voyage to which reference was made by the Consul General at Buenos Aires was the voyage which the vessel was making for the benefit of Linea Sud Americana, Inc., a private corporation, and petitioner (R. 140-143). This affidavit was not contradicted and the District Judge for that reason relied upon its allegations in declining to open up the final decree (R. 168-172).

Employment has always been recognized as an essential element in determining whether a vessel is subject to judicial process. In *Ex parte State of New York,* 256 U. S. 503, at p. 510, this Court said:

> "By the law of nations, a vessel of war owned by a friendly power and *employed in its service* will not be subjected to admiralty process; and this upon general grounds of comity and policy. *Schooner Exchange* v. *McFaddon,* 7 Cranch. 116, 144-147." (Italics ours.)

In these circumstances, as was pointed out in *The Pesaro, supra,* the Spanish Government stood in the "attitude of a suitor". As the Court could not take judicial notice of the facts alleged in the suggestion (*Ex parte Muir, supra*), it became necessary for the Spanish Government to establish its claim by proof. Until that was done, we submit, any decree dismissing the libel, such as that directed by the Circuit Court of Appeals (R. 233), was erroneous. Obviously, when there was no proof, nor for that matter proper allegations, that the vessel was "held and used for a public purpose", there could be no immunity.

There is nothing in *Oetjen* v. *Central Leather Company,* 246 U. S. 297, or its companion case, *Ricaud* v. *American Metal Co.,* 246 U. S. 304, cited by the Circuit Court of Appeals, which sustain its statement that the allegations of an Ambassador are conclusive. These cases did not involve any suggestion of an Ambassador, nor any question of judicial notice, other than of recognition by our Government of the Government of Carranza as the *de facto* government of the Republic of Mexico, on October 19, 1915, and as the *de jure* government on August 31, 1917. Judicial notice of recognition of a foreign

Government is quite a different thing from judicial notice of the allegations of suggestions filed with our courts by counsel for a diplomatic officer of a foreign government, after the Executive Department had declined to accept such allegations (R. 255, 256).

The practice in the English cases is set forth in *The Parlement Belge,* 5 P. D. 197, where objection was made to the jurisdiction by the Attorney General; in *The Jasey* (1906), P. D. 270, where a representation that the vessel was state-owned was made to the Register of the Admiralty Court by the Secretary of State for Foreign Affairs; in *The Porto Alexandre* (1920), P. D. 30, where representation that the vessel was state-owned was made to Lord Curzon, the Secretary of State for Foreign Affairs, who in turn communicated to the trial judge that the vessel was the property of a friendly government.

The only authority, other than the *Oetjen* and *Ricaud* cases, cited by the Circuit Court of Appeals in support of its holding is *The Adriatic,* 258 Fed. 902. That was a decision rendered by the Circuit Court of Appeals for the Third Circuit before this Court decided *Ex parte Muir.* It is of interest to note that the *Adriatic* was cited in support of his argument by the losing counsel in *Ex parte Muir,* 254 U. S. at page 523.

We submit that the allegations of the suggestion were not conclusive, and that the Circuit Court of Appeals was wrong in dealing with the case as if the allegations of the suggestions were conclusive. Moreover, the Court did not have proper proof of the diplomatic character of the persons making the suggestion.

C.

(1) Luis Careaga, who made the suggestion, was alleged to be an Acting Consul General of Spain. As such he was without authority to make any representation whatever on behalf of the Republic of Spain.

(2) The question whether or not Careaga was clothed with a diplomatic function was a political question and not a judicial question, and in the absence of a decision on that question by the political department of the Government, the Court should have disregarded the application of Careaga.

(1) It has long been settled by decisions of this Court that a Consul as such is not clothed with authority to act as a diplomatic agent of his sovereign. See *The Anne,* 3 Wheat. 434, at 445, where this Court, speaking through Mr. Justice Story said:

> "And this brings us to the second question in the cause; and that is, whether it was competent for the Spanish consul, merely by virtue of his office, and without the special authority of his government, to interpose a claim in this case for the assertion of the violated rights of his sovereign? We are of opinion, that his office confers on him no such legal competency. A consul, though a public agent, is supposed to be clothed with authority only for commercial purposes. He has an undoubted right to interpose claims for the restitution of property belonging to the subjects of his own country; but he is not considered as a minister, or diplomatic agent of his sovereign, intrusted, by virtue of his office, with authority to represent him in his negotiations with foreign states, or to vindicate his prerogatives. There is no doubt, that his sovereign may specially entrust him with such authority; but in such case, his diplomatic character is superadded to his ordinary powers, and ought to be recognized by the Government within whose dominions he assumes to exercise it. There is no suggestion or proof of any such delegation of special authority in this case; and therefore, we consider this claim as asserted by an incompetent person, and on that ground, it ought to be dismissed. It is admitted, that a claim by a public minister, or, in his absence, by a *charge d'affaires,* in behalf of his sovereign,

would be good. But in making this admission, it is not to be understood, that it can be made in a court of justice, without the assent or sanction of the government in whose courts the cause is depending. That is a question of great importance, upon which this court expressly reserve their opinion, until the point shall come directly in judgment."

Recently in the case of *The Sao Vicente*, 260 U. S. 151, at p. 155, this Court took occasion to quote much of the foregoing language and to approve it.

(2) In the present case, after making his first application, which was denied, Careaga filed a certificate stating that a Power of Attorney, clothing him with diplomatic power to act for the Republic of Spain in the matter of claiming the S. S. "Navemar", was lodged in the Embassy of Spain at Washington. This certificate is signed by the Counsellor to the Embassy and is certified by Careaga and the Counsellor to the Consulate. No certificate or statement of any kind has been made by any political officer of the Government of the United States as to Careaga's status. Under these circumstances we submit that the court should disregard Careaga for the reasons set forth in *The Anne, supra.* Proof of delegation of special diplomatic authority should be made to the political department and until such proof is made Careaga cannot be considered as being clothed with diplomatic authority. See *Doe ex dem. Clark* v. *Braden*, 16 How. 635, at p. 656, where this Court held that it was for the Executive Department of the Government rather than for the Judicial Department, to determine who represents a foreign government. See also *Terlinden* v. *Ames*, 184 U. S. 270.

In *State of Russia* v. *National City Bank of New York*, 69 F. (2d) 44, the Circuit Court of Appeals for the Second Circuit, at page 47, said:

"As to the authority of Foreign Commissar Litvinoff to make the assignment on behalf of his government, there is a presumption of authority in his designation, recognition, and the President's acceptance of the assignment. It is a matter of political action in foreign affairs, and *the question of who represents and acts for a sovereign or nation in its relation to the United States is determined, not by the*

Judicial Department, but exclusively by the political branch of the government. Lehigh V., R. Co. v. *State of Russia, supra; Doe ex dem. Clark* v. *Braden,* 16 How. 635, 656, 14 L. Ed. 1090; Hyde on International Law, Vol. 1, p. 368; *Terlinden* v. *Ames,* 184 U. S. 270, 288, 22 S. Ct. 484, 491, 46 L. Ed. 534." (Italics ours.)

See also *Agency of Canadian Car & Foundry Co.* v. *American Can Co.,* 258 Fed. 363, where the Circuit Court of Appeals for the Second Circuit said (pp. 368-369):

"In the same way the question who represents and acts for a foreign sovereign or nation in its relations with the United States is determined, not by the judicial department, but exclusively by the political branch of the government. *In re Baiz,* 135 U. S. 403, 10 Sup. Ct. 854, 34 L. Ed. 222. So that the certificate of the Secretary of State, above referred to, certifying to the official character of Boris Bakhmetieff as the Russian ambassador to the United States is not only evidence, but it is the best evidence, of Mr. Bakhmetieff's diplomatic character, and is to be regarded by the courts as conclusive of the question, and the court could not proceed upon argumentative and collateral proof. And the certificates of Mr. Bakhmetieff, given under his hand and seal as Russian ambassador, concerning the membership and powers of the Russian Supply Committee, must be regarded in like manner as an authoritative representation by the Russian government on that subject, and as such binding and conclusive in the courts of the United States against that government on the matters to which it relates."

For these reasons alone, independently of those which we shall now call to the Court's attention, we submit that the decision of the Circuit Court of Appeals should be reversed, and the decrees of the District Court should be affirmed.

II.

The Republic of Spain sought in its application, called a suggestion, to become a suitor in a Court of the United States, and for that purpose requested leave to file a claim to the Steamship "Navemar" and thereby to assert a proprietary right in that vessel.

The District Court was right in denying such an application, because the Republic of Spain was not in actual possession of the "Navemar", and the Circuit Court of Appeals was in error in holding that "constructive possession" was as efficacious as actual possesssion for purposes of immunity.

A.

In an admiralty suit a claimant is an actor, and is entitled to come before the Court in that character only, in virtue of his proprietary interest in the thing in controversy; this alone gives him *persona standi in judicio. United States* v. *422 Casks of Wine,* 1 Peters 547, at 549.

We respectfully direct the Court's attention to the fact that the circumstance which led to the institution of this suit was the unlawful action of five members of the crew who interfered with the orderly operations of the "Navemar" while she was lying at anchor in New York harbor, in preventing a repair gang from Robins Dry Dock from making necessary repairs (R. 171), which the master had ordered on the petitioner's instruction (R. 171). These men have never appeared in this cause, nor have they given any evidence as to what animated them, nor have they stated that they were acting for any persons other than themselves and the other members of the crew of the "Navemar". It does appear, however, that they were represented by their own counsel, Mr. Thomas A. McDonald (R. 177, 221, 223) and that when the Spanish Ambassador gave notice of appeal in this case,

his proctors served the notice of appeal on Mr. McDonald as proctor for these men (R. 177) as well as on proctors for Robins Dry Dock & Repair Co. (R. 177). It also appears that these men, with other members of the crew, instituted a suit against the "Navemar" for their wages, in which suit petitioner appeared as claimant, and later by a consent decree (R. 223) agreed to the amount of the wages due up to and including December 16, 1936. That decree has been satisfied (R. 224) by the petitioner paying the wages (R. 221) and supplying these men with transportation to Barcelona, Spain. It also appears that none of these men have taken an appeal from the orders and decrees of the District Court in this cause, although they were sued *in personam* and named as respondents in the cause, and were served with process (R. 6).

The existence of these other suits was called to the attention of the Circuit Court of Appeals in the petition for a rehearing (R. 240, 241), and the Court's attention was directed to the fact that the vessel was in the custody of the District Court at the time this suit was commenced (R. 250). Hence when this suit was begun "there was nothing to prevent the vessel from being subjected to attachment under process" in the present case. *Ex parte Whitney Steamboat Corporation,* 249 U. S. 115, at p. 118. Moreover, as was said by this Court in *The Santissima Trinidad,* 7 Wheaton 283, at p. 355 (Story, *J.*):

> "By the seizure and possession of the property under the process of the district court, the possession of the captors was divested, and the property was emphatically placed in the custody of the law."

So also here, by the seizure and possession of the "Navemar" under the process of the District Court in the *Robins Dry Dock & Repair Company* case, the "Navemar" was placed in the custody of the law. In the light of this uncontrovertible fact, how can a serious contention be made that the Republic of Spain was in actual possession of the "Navemar" when this suit was commenced?

So far as the record shows, the Republic of Spain made no effort to file a claim in the Robins Dry Dock & Repair Co. suit,

although if the suit at bar had not been dismissed, this petitioner could have shown that it did file a claim of owner in that case. The Republic of Spain knew of the existence of that suit, because it served a copy of the notice of appeal in this case upon the proctors for the Robins Dry Dock & Repair Co.* (R. 177). Perhaps that circumstance accounts for the fact that only a "part" of the record in the District Court was certified to the Circuit Court of Appeals (R. 184). It did, however, ask leave "to appear as claimant" to the "Navemar" in these proceedings (R. 119). In so doing it asked to come before the court in the character of an actor in virtue of a proprietary interest of the Republic of Spain in the thing in controversy. That such is the significance of a claim in an *in rem* proceeding is elementary, and has been long established. The significance and purpose of a claim in admiralty has nowhere been better stated than by Mr. Justice Story in the opinion of this Court in *United States* v. *422 Casks of Wine*, 1 Peters 547, at page 549, where it is said:

> "The second ground is, that Messrs. Hazard & Williams, in whose behalf the claim in this case was interposed, are not the real owners of the wine under seizure, but the same was owned by one Charles Hall; so that the claimants are not entitled to any judgment of restitution. The objection is founded upon a mistaken view of the time, nature and order of the proceedings proper in suits *in rem*, whether arising on the admiralty or exchequer side of the court. In such suits, the claimant is an actor, and is entitled to come before the court in that character only, in virtue of his proprietary interest in the thing in controversy; this alone gives him *persona standi in judicio*. It is necessary that he should establish his right to that character as a preliminary to his admission as a party *ad litem*, capable of sustaining the litigation. He is, therefore, in the regular and proper course of practice, required, in the first instance, to put in his claim, upon oath, averring in positive terms his proprietary instance; if he refuses so to do, it is sufficient a reason for a rejection of his claim."

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* The proper practice in such cases is set forth in *United States* v. *422 Casks of Wine*, 1 Peters 547, at p. 549, where this Court said that where more than one person asserts title to the property, the Court in its discretion may permit a second claim to be interposed in order that the Court may decide to whom the property belongs.

See also Benedict on Admiralty, 5th Edition, §324, at pages 393 and 394.

Counsel for the Spanish Ambassador recognized the need to allege a proprietary interest in order to lay a foundation for their application to file a claim to the "Navemar"; for in the first application the grounds for intervention are stated thus:

> "The said Luis Careaga in his official authority and capacity aforesaid represents to this Honorable Court that in the month of October, 1936, the Consul General of the Republic of Spain at Rosario, Argentine, pursuant to instructions from the General Director of the Spanish Merchant Marine, took possession of the said Steamship 'Navemar', in the name of the Republic of Spain under a decree of the Republic of Spain dated the 10th day of October, 1936, whereby the said Steamship 'Navemar' then and there became and at all times since has remained the property of the Government of the Republic of Spain" (R. 101).

The District Court, correctly followed *Ex parte Muir,* 254 U. S. 522, and held that these allegations were not enough to warrant vacating the final decree. Thereupon a second application for intervention was made by the Ambassador. After the Court had examined the second application, it observed that its allegations were substantially the same as those on the first application (R. 174). As it appeared from the moving papers (R. 119-127), that the only proprietary right alleged depended upon an alleged possession taken at Buenos Aires in the Argentine Republic, the District Court in order to make certain of the intervenor's position had the following colloquy with intervenor's counsel:

> "The Court: Really, I have to get answers to my questions, if you are here as a supplicant.* Unless you are willing to answer my questions, I cannot do anything for you.

* Although the Ambassador was represented by counsel at the outset of the proceedings, he chose to stand by and do nothing until a final decree had been rendered and executed. We submit that his subsequent belated application to intervene in the case could only be regarded as an appeal to the court's discretion; and that the court exercised a very sound discretion in declining to reopen the case on the showing made.

Mr. Atkins: Mr. Ryan has asked the question.

The Court: I want a categorical answer, a definitive answer, to Mr. Ryan's question: When do you claim you took physical possession of that vessel and where?

Mr. Atkins: We took possession—we took it on, I will put it, October 28, 1936.

The Court: Where?

Mr. Atkins: At—we were in possession of it on October 28, 1936.

The Court: When did you take possession?

Mr. Atkins: On October 16, 1936.

The Court: Where?

Mr. Atkins: Wherever the vessel was at that time.

The Court: I don't know where it was.

Mr. Atkins: I don't know.

Mr. Rosenberg: Buenos Aires.

Mr. Atkins: No, she arrived in Buenos Aires on—yes, at Buenos Aires. We gave notice of it on October 28th, and the master recognized it on October 28th, 1936, that possession of the S. S. 'Navemar' was taken by the Spanish Government, and the vessel was confiscated by the decree of October 10th, and that is the master writing to the owners—to the prior owners of the 'Navemar'.

The Court: That is the best answer you can get" (R. 95).

It was also conceded that the only alleged possession which the Republic of Spain took at that time was a "constructive possession" (R. 172). In short the question is not one of immunity; it is whether a foreign sovereign may by its bare declarations obtain possession of a chattel, to which its only claim is a decree of confiscation, when that chattel was first in the possession of its owners and then in the custody of our courts, and when concededly the foreign sovereign never had actual possession of it.

Our Courts have for years recognized, that to render a vessel immune from suit, there must be actual possession of the vessel by a sovereign at the time the suit is brought. Otherwise, to give such a foreign vessel immunity from suit in cases of confiscation, would be to assist a foreign government in enforcing a decree penal in nature, which is contrary to well settled principles of international law. *Banco de Vizcaya* v. *Don Alfonso de Borbon y Austria* (1935), 1 K. B. 140, at page 144. That case dealt with the property of King Alfonso,

declared confiscated by the Republic of Spain. The Banco de Vizcaya, as King Alfonso's agent, deposited with Westminster Bank, Ltd., of London, England, certain securities. After the decree of confiscation, the Banco de Vizcaya demanded these securities for the Republic of Spain. The Westminster Bank, Ltd. thereupon filed an interpleader and notified King Alfonso of the demand. The Court held that as the decree of confiscation was penal, it could not be enforced in Great Britain. The Court said:

> "In the words of Lord Loughborough in *Folliott* v. *Ogden* (1789), 1 H. Bl. 124, 135: 'The penal laws of foreign countries are strictly local, and affect nothing more than they can reach and can be seized by virtue of their authority; a fugitive who passes hither, comes with all his transitory rights; he may recover money held for his use, stock, obligations and the like; and cannot be affected in this country, by proceedings against him in that which he has left, beyond the limits of which such proceedings do not extend.' These words have frequently been cited with approval, and in my judgment they are directly applicable to the present case. I therefore hold that H. M. Don Alfonso and not the plaintiffs is entitled to the securities in question."

The Privy Council in *Huntington* v. *Attrill* (1893), A. C. 150, discusses what constituted a penal law. In the course of its discussion, it referred to this Court's decision in *Wisconsin* v. *The Pelican Insurance Company,* 127 U. S. 265, and quoted the following excerpt from the opinion of Mr. Justice Gray in that case:

> "The rule that the Courts of no country execute the law of another applies not only to prosecutions and sentences for crimes and misdemeanors, *but to all suits in favour of the State* for the recovery of pecuniary penalties for any violation of statutes for the protection of its revenue or other municipal laws, and to all judgments for such penalties." (Italics the Courts, p. 157.)

That confiscation is an act of penal justice has been long established. See *The Globe,* 10 Fed. Cas., Case No. 5484, at p. 483, where it is said:

> "Confiscation is either an act of penal justice for the

punishment of great crimes against the state (Bl. Comm. 299), or the exercise of a belligerent right against the property of public enemies (Kent, Comm. 61-66); not the arbitrary seizure of the property of one person, whether citizen or stranger, for the benefit of another person."

In the present case, as in the case of *Banco de Vizcaya* v. *Don Alfonso de Borbon y Austria* (1935), 1 K. B. 140, there is little question as to the penal nature of the confiscation. Even if the Ambassador's application should be granted, the petitioner should be permitted to show, if it can, apart from the confiscatory character of the decree, that it is in fact a penal enactment against two alien friends long resident in the United States—Mr. Garcia and Mr. Diaz, the sole two stockholders of petitioner.

B.

Constructive possession by a foreign government of a vessel is not sufficient to render her immune from suit in the courts of the United States.

In *The Davis,* 10 Wall. 15, at page 21, this Court said:

"But what shall constitute a possession which, in reference to this matter, protects the goods from the process of the court? The possession which would do this must be an *actual possession* and not that mere constructive possession which is very often implied by reason of ownership under circumstances favorable to such implication." (Italics ours.)

In *Long* v. *The Tampico,* 16 Fed. 491, Judge Addison Brown said, at pages 493 and 494:

"The elaborate and exhaustive examination given to the subject of the exemption of the property of a sovereign power in the cases of *The Exchange,* 7 Cranch. 117; *Biggs* v. *Light-Boats,* 11 Allen (Mass.) 157; and *The Parlement Belge* (1880), on appeal (5 Prob. Div. 197), renders superfluous any further examination of the general principles involved. These cases fully sustain the general proposition that the property of a government, *while in its pos-*

session and employed in or devoted to the public use, is exempt from judicial process, on the ground that the exercise of such jurisdiction is inconsistent with the independence of the sovereign authority and the necessities of the public service. In the late case of *The Fidelity,* 16 Blatchf. 569, * * * Waite, *C. J.,* says: * * *

> *'Property does not necessarily become a part of the sovereignty because it is owned by the sovereign. To make it so, it must be devoted to the public use* and must be employed in carrying on the operations of the government.'" (Italics ours.)

In *The Carlo Poma,* 259 Fed. 369, at p. 370, it is said:

> "The law of the United States is the same, except that the immunity of property of a sovereign, whether the United States or a foreign sovereign, depends, not merely upon the ownership, but also upon *the actual possession* by the sovereign of the property at the time process is served. *The Davis,* 10 Wall. 15; *Long* v. *The Tampico,* 16 Fed. 491; *The Attualita,* 238 Fed. 909." (Italics ours.)

The Carlo Poma was reversed, but on other grounds—see 255 U. S. 219. See also *The Beaverton,* 273 Fed. 539.

In *The Attualita,* 238 Fed. 909, the Circuit Court of Appeals for the Fourth Circuit held that constructive possession was not enough. See also *The Johnson Lighterage No. 24,* 231 Fed. 365.

To sustain its position against this array of authority, the Circuit Court of Appeals relied upon the following cases: *The Roseric,* 254 Fed. 154, a District Court opinion; *The Adriatic,* 258 Fed. 902 (C. C. A. 3), [Both of these cases must be regarded as having been overruled by this Court in *Ex parte Muir,* 254 U. S. 522] and *The Jupiter* (1924) P. 236. We cannot find any language in *The Jupiter* which supports the proposition that constructive possession by a foreign sovereign is enough to render a vessel immune from suit. On the contrary, we find, in the judgment of Bankes, *L. J.* (1924), P. 241, that he relies upon the Court's previous decision in *The Gagara* (1919) P. 95, 101, where the Esthonian Government was in *actual possession* of the ship, and that Govern-

ment stated that the ship was being used by it for public purposes. In *The Jupiter No. 2* (1925) P. 69, it is stated that the master, without the knowledge of the plaintiffs, handed over the "Jupiter" and her papers to a representative of the Union Socialistic Soviet Republics and refused thereafter to recognize the plaintiffs as owners. See also *The Jupiter No. 3*, (1927) P. at p. 129. All three of these cases refer to the fact that when the "Jupiter" was arrested in the first suit, she was in the actual possession of the Soviet Government. In the second and third suits, when the "Jupiter" was no longer in the actual possession of the Soviet Government, the Court passed upon the question of her ownership despite the declaration of that government (1927) P. at p. 138.

The Circuit Court of Appeals evidently felt considerable doubt as to its position, because at the end of its opinion, it mentioned four circumstances which it regarded as constituting some evidence of possession of the "Navemar" by the Republic of Spain.

When we examine the Careaga affidavit, we find an allusion to two only of these four circumstances, viz., those numbered by the Court "Second" and "Fourth" (R. 232-233). The "Second" of these circumstances, is the endorsement by the Spanish Consul at Rosario of the ship's registry and roll (R. 232) and the "Fourth" is the "advance" by the Consul of $300 to the master (R. 233). We shall deal with them in order.

The taking of the ship's roll to a Spanish Consul is routine and is without significance (R. 139). This statement is not denied. So far as the ship's register is concerned, the Consul General of Spain at Buenos Aires requested the master to deposit the register at the consulate (R. 141). The master took the register to him in pursuance of that request. The Consul kept it until the day when the vessel was to sail, and then he redelivered it to the master (R. 22). We are at a loss to understand how any significance as to possession of the "Navemar" can be given under those circumstances to the endorsements placed by the Consul on either of these two papers. Moreover, it is well settled that a ship's register is in-

sufficient to show ownership—*National Oil Transport Co. Inc.* v. *United States,* 18 Fed. (2d) 305; if it is insufficient to establish ownership, of what evidential value, as to ownership or possession, is there in an endorsement upon it? The petitioner never agreed to these endorsements (R. 67).*

As to the "Fourth" circumstance (R. 233), the advance of $300 to the master by the Consul, it is sufficient to say that $300 was but a fraction of the amount paid by the petitioner, as owner, for wages and provisions to take care of the "Navemar" during the period in question (R. 155-161, 223, 224). During the period from December 2, 1936 to December 15, 1936, the petitioner paid $593.81 "for all victuals provision and supplies furnished to the S. S. 'Navemar' and to her officers and crew" (R. 161), and also $3,525, plus transportation to Barcelona, as wages of the crew up to and including December 16, 1936 (R. 223). If payment of money is to be a criterion, the weight is heavily on the side of petitioner. As, however, Mr. Garcia's testimony that all of the crew were in his employ throughout the period under discussion (R. 78) is uncontradicted, it would seem that there should not have been any controversy on this point.

With respect to the first and third proposition (R. 232), which are taken from evidence outside of the suggestion, it is respectfully submitted that these alleged statements of the master are in direct contradiction to an affidavit which the master has made in this case (R. 138-153). But even if the statements should be accepted as establishing any fact, we submit that such facts do not establish change of possession. It has long been settled in this Court that the master of a ship has no power to transfer or otherwise dispose of his employer's vessel, except where the shipowners are beyond "the ordinary means" of communication. See *The Sarah Ann,* 13 Peters 386, at page 401, where this Court, speaking through Mr. Justice Wayne, said:

"The true criterion for determining the occurrence of

* In their brief in opposition to the petition, counsel for the Ambassador cite *The Santissima Trinidad,* 7 Wheaton 283, but as the subject dealt with there was the evidential value of a commission of a public ship of a foreign state, and as no contention has ever been made that the "Navemar" was ever commissioned, the case is clearly not in point.

the master's authority to sell is the inquiry, whether the owners or insurers, when they are not distant from the scene of stranding, can, by the earliest use of the ordinary means to convey intelligence, be informed of the situation of the vessel, in time to direct the master, before she will probably be lost."

See also *The Amelie,* 6 Wall. 18, at page 27, where the Court, speaking through Mr. Justice Davis, said:

"If the master can within a reasonable time consult the owners; he is required to do it, because they should have an opportunity to decide whether in their judgment a sale is necessary."

See *The Yarkand,* 120 Fed. 887, where it is said, at page 891:

"It is settled law that a master has no general authority *virtute officii,* to sell his vessel."

In *The Jupiter No. 3* (1927) P. 122, Mr. Justice Hill, at pages 129, *et seq.,* dealt with the precise question, and at page 135, said:

"It follows that the custody of Captain Lepine was for M. Bourgeois, as it had previously been for Paitre Pelen. Captain Lepine was under the orders of and paid by the administrator for the time being, and was custodian of the ship for him. He was the servant of the administrator. Whom else could he have sued for his wages,* who else could have dismissed him? If he had incurred liabilities for necessaries on account of the ship, who else but the administrator would have been liable *in personam?*

"The result of these considerations is that in March, 1924, when Lepine allowed the U. S. S. R. to take possession of the ship, M. Bourgeois was in actual possession and had the right to possession. Lepine may have acted as a loyal subject of the U. S. S. R., but he betrayed his trust to his employers. *Prima facie* the act of Lepine was wrongful. *Prima facie* M. Bourgeois, who had possession in fact and law, was wrongfully deprived of possession in fact. *Prima facie* M. Bourgeois is entitled to recover possession. His

* It is of interest here to observe that the five respondents against whom the suit was brought by petitioner to regain possession of its vessel, did in fact acknowledge that they were petitioner's servants when they brought suit against petitioner for their wages (R. 223).

right does not depend merely upon a right to sue given by the French decrees. It depends upon possession, and right to possession, in England, and wrongful dispossession in England, and the ship is under the arrest of this Court."

So also with respect to the possession of the five respondents, members of the crew of the "Navemar". Even if they should assert, which they have not, that they held the "Navemar" for the Republic of Spain, that assertion would be unavailing for the reasons just quoted from the judgment of Mr. Justice Hill in *The Jupiter No. 3* (1927) P. 135. In short, because possession of the vessel had not been handed over to a representative of the Republic of Spain, as was done in *The Jupiter* and not done here, possession of the "Navemar" remained with the petitioner. See Pollock & Wright on Possession in the Common Law, at pages 60 and 138-9.

In cases such as *The Gagara* (1919) P. 95; *The Jupiter* (1924) P. 236 and *The Cristina** (Court of Appeal of England, not yet reported), where actual possession is in a foreign sovereign, the vessel is immune. The reason for immunity in these cases is that a foreign government was, at the time the suit was brought, in actual possession of the vessel. Consequently, process in these cases could not be executed without disturbing the physical control of a foreign sovereign. The mere arrest of the vessel in these cases would have interfered with sovereignty. When, however, as was the case here, the sovereign has no actual possession, but merely a hope or intention of reducing the vessel to actual possession, a suit against the vessel by a private person does not interfere with any control by a foreign sovereign.

We have already shown (pp. 25-26, *supra*) that when an action is brought by a foreign sovereign for the purpose

* *The Cristina* in the Admiralty Division is reported in 59 Lloyds List Rep. 1. That Court held that the ship was in the possession of the Republic of Spain. In the Court of Appeal, Greer, *L. J.*, treated the case as being governed by *The Jupiter* (1924), P. 236, and stated that the suit was to oust the possession of the Spanish Government, hence it could not be allowed. Scott, *L. J.*, said that when the writ was issued, the "vessel was already in the actual possession of the Spanish Government". We are informed that the House of Lords has allowed an appeal.

of enforcing a penalty, such an action is illegal and may not be sustained in the courts of the United States. We shall now show that where the property is owned by an alien friend, a decree of confiscation may never be enforced in our Courts against the property rights of such alien friends.

C.

A title based upon a decree of confiscation may not be asserted beyond the territorial limits of the confiscating power for the purpose of acquiring possession of the thing confiscated as against a lawful owner when such lawful owner is an alien friend.

(1) *The Law in The United States.*

This Court in *Ingenohl* v. *Olsen,* 273 U. S. 541, speaking through Mr. Justice Holmes, said at page 544:

> "If the Alien Property Custodian purported to convey rights in English territory valid as against those whom the English law protects he exceeded the powers that were or could be given to him by the United States."

That case involved the use in Hong Kong, English territory, of certain trade marks of an alien enemy residing in Manila, which had been confiscated by the Alien Property Custodian. The Court held that English law protected a resident of Hong Kong against such confiscation. The Court's holding that English law protects these rights is particularly interesting here, in the light of the case of the Motorship Cabo San Antonio, Appendix A of this brief. In that case the Federal Court of Civil and Commercial Actions at Buenos Aires, in the Argentine Republic, held that the Argentine Government did not regard the confiscation of the "Cabo San Antonio" by the Spanish Government as legal when the vessel was within the territorial waters of the Argentine at the time of the confiscation.*

We find nothing in this Court's decision in *United States* v. *Belmont,* 301 U. S. 324, in conflict with the foregoing.

* Although there is no evidence in the present case of the law of the Argentine Republic, clearly, if the final decree is to be opened up, petitioner should be permitted to offer evidence on that subject, as well as on other subjects relevant to the controversy.

As we understand *United States* v. *Belmont,* there was no one to object to the confiscation, other than a depositary, a debtor, who admittedly had no proprietary interest in the property confiscated. Moreover, the confiscating power had become "vested" with "the substantive right to the money" involved as the successor to the corporation to whom the debtor owed the money, and our own government had undertaken to collect the debt for the confiscating power through official channels of the United States. Nor do we understand that *United States* v. *Belmont, supra,* was intended to modify what was said by this Court in *Clark* v. *Williard,* 294 U. S. 211, at page 213:

> "Every state has jurisdiction to determine for itself the liability of property within its territorial limits to seizure and sale under the process of its courts."

In *Cottam* v. *Comision,* 149 La. R. 1026, the Supreme Court of Louisiana held that the constructive seizure of the Steamship "Oaxaca" by the Mexican government while the vessel was in the port of New Orleans, was ineffective as to rights protected by the law of Louisiana.

Cf. Vladikavkazsky Ry. Co. v. *N. Y. Trust Co.,* 263 N. Y. 369.

The District Court found (and that finding is not criticized by the Circuit Court of Appeals) that the petitioner was domiciled in the United States (R. 174). That finding rests upon evidence that Mr. Garcia and Mr. Diaz, the sole stockholders of petitioner corporation had resided in the United States, one for thirty-four years (R. 66), and the other for about thirty years (R. 66), and that the active management of the petitioner is carried on in New York (R. 77). Relying on this evidence, the District Court concluded that the petitioner was entitled to protection as an alien friend (R. 174), citing *Russian Volunteer Fleet* v. *United States,* 282 U. S. 481, at p. 489, where this Court said:

> "The petitioner was an alien friend and as such was entitled to the protection of the Fifth Amendment of the Federal Constitution. *Wong Wing* v. *United States,* 163

U. S. 228, 238; Compare *Yick Wo.* v. *Hopkins,* 118 U. S. 356, 369; *Santa Clara County* v. *Southern Pacific R. Co.,* 118 U. S. 394, 396; *Truax* v. *Raich,* 239 U. S. 33, 39; *Home Insurance Co.* v. *Dick,* 281 U. S. 397, 411."

It follows, that as the Argentine Law protected petitioner from such confiscation, and as petitioner was an alien friend, our Courts should not aid the Republic of Spain in its attempt to take possession of property alleged to have been confiscated by it.

(2) *The law as generally administered in the civilized countries of the world.*

This Court held in *Queen Insurance Co.* v. *Globe & Rutgers Fire Insurance Co.,* 263 U. S. 487, that in questions of marine insurance law, it is important to keep the law of the United States in harmony with that of England. We submit that for like reasons, our law on the subject under discussion should not be permitted to vary greatly from that of the other powers. An examination of the law of the principal countries of the world shows that the decision of the Circuit Court of Appeals cannot be reconciled with their laws:

In the Argentine Republic: In a possessory case, brought by the owners of the Spanish Motorship "Cabo San Antonio" in the Federal Court in the Argentine Republic, it was held, after the Political Department of the Government had declined to intervene or to recognize the confiscation of that vessel by the Spanish Government as legal, that the former owners were entitled to possession. See Appendix A. (Translation ours.)

In England: In *The Jupiter No. 3* (1927) Probate 122, at page 144, Mr. Justice Hill said:

"As to the second question—that is, the question whether the decrees transferred the property wherever situated—it was not suggested that ships were to be governed by any principles other than those applicable to other chattels. *If the 'Jupiter' was not within the territory of the R. S. F. S. R., I do not see how the mere passing of a decree could transfer the property.* This seems to me to be recognized

in all the cases: see, for instance, per Atkin, *L. J.*, in *Goukassow's* case (1923), 2 K. B. 682, 693; per Sargant, *L. J.*, in *Segwick, Collins & Co.'s* case in the Court of Appeal (1926), 1 K. B. 1, 15; and per the Lord Chancellor in the latter case in the House of Lords (1927), A. C. 95. The Lord Chancellor treats it as obvious that the property and rights of the company in the countries foreign to Russia are not effectively taken from it by the Russian legislation." (Italics ours.)

Mr. Justice Hill's opinion was adopted *in toto* by the Court of Appeal. See *The Jupiter* (1927) Probate 250, at page 253, and at page 255.

In Belgium: See *Martiarena* v. *Amalibobeta and Urutia,* reported in the Rechtskundig Weekblad (Weekly Law Gazette, published at Antwerp) in the issue of March 7, 1937. A translation of that opinion is annexed to this brief, as Appendix B. (Translation ours.)

In the Netherlands: See *German Reich* v. *Merzbach, et al.* (1925), (Netherlands), Weekly Law Journal (1926), No. 11440, p. 3, (published at The Hague), where there was a question as to the title to some rafts which had been exported from Germany in violation of German law, which provided that no goods could be sent out of Germany without a proper export license, and further that, if they should be so sent out, the goods would be forfeited to the German Reich. The German Reich contended that as soon as the rafts left the German territory without the export license, they automatically became the property of the German Government. Notice of forfeiture was served upon the persons in possession of the rafts while the rafts were within the territorial jurisdiction of the Netherlands. In deciding the case, the Court said, without giving further reasons for its decision:

"* * * as it is contended (by the German Reich) that title passed herein by virtue of the notice * * * its position involves a violation of the sovereignty of the State of the Netherlands, which does not permit that effect be given to the official notice served on behalf of the German Reich on Netherlands territory * * *." (Translation ours.)

In Germany: See Frankenstein, Internationales Privat Recht, Volume II, page 77, where it is said:

> "The *lex rei sitae* on principle also governs the acquisition of title through an act of State." (Citing *The Jupiter* (1927), Probate 250.) (Translation ours.)

In Switzerland: See *Compagnie fermiere de la Grande Chartreuse* v. *Rey,* Tribunal Federal, July 11, 1913, 39 R. O. II, 640, 652, where the Federal Tribunal of Switzerland, in denying the claim of the French liquidators, said:

> "It is not necessary in order to support this view to invoke the odious character of the Law of 1901. * * * It is sufficient to recall that political acts have validity only within the country where they are accomplished and their recognition in foreign countries is opposed, in the absence of special circumstances, to the principle of sovereignty of that state. * * * Admitting even that the French Law of 1901 had certain effects in private law, it nevertheless remains true that they would not be recognized in a state whose public law does not permit the confiscation of the property of individuals." (Translation confirmed by us.)

In France: See *Etat Russe* v. *Ropit,* Trib. Comm. *Marseille,* April 23, 1925 (1925) 52 Clunet 391, where the French Court declined to recognize the title of the Soviet Ambassador as against a Liquidator of the French Court who had been appointed at the request of shareholders, refugee Directors of the Ropit Company, as to property of the Ropit Company situated in France. The Court of Appeal at Aix declared:

> "It is inadmissible that the French state in recognizing the Soviet Government *de jure* is *ipso facto* precluded from refusing to apply any of the provisions of (Russian) law which seem to it contrary to its own conception of national public order." [(1926) 53 Clunet 667, at p. 668.] (Translation ours.)

The case went to the Court of Cassation, and that Court said:

> "Whereas in principle the courts of one state, when they have to pass upon a legal question which has its roots in foreign legislation, must apply foreign law, this rule is obligatory only where the application of foreign law or the

recognition of rights acquired under foreign law do not conflict with the principles or the application of domestic laws essential to the maintenance of public order. * * * Whereas the Soviet decree of January 26, 1918 nationalized the Russian mercantile fleet without just compensation being granted to the dispossessed proprietors, this decree thereby instituted a mode of seizing property which French courts cannot recognize. * * *" [(1928) 55 Clunet 674 at 674-675]. (Translation ours.)

And see *Petrogradsky M. K. Bank* v. *National City Bank*, 253 N. Y. 23, at p. 39 where the Court (Cardozo, *C. J.*) pointed out that France had failed to give effect to titles having their basis in decrees of confiscation.

See also *Confiscation: Extraterritorial and Domestic, Borchard, The American Journal of International Law*, Vol. 31, pp. 675-681; *The Recovery of the Foreign Assets of Nationalized Russian Corporations*, 39 Yale L. J. 1130; *Wohl, Nationalization of Joint Stock Banking Corporations in Soviet Russia*, 75 U. of Penn. *Law Review* 385, and *G. C. Cheshire on Private International Law*, pp. 75-78.

Fenwick in his work on international law, well summarizes the prevailing view (Professor Charles G. Fenwick's "International Law", Second Revised Edition, 1934, D. Appleton-Century Co., New York):

"In admitting aliens within its territory, whether as transient visitors or as permanent residents, states assume an obligation to give them a degree of protection which, as a minimum, is represented by the protection which they give to their own citizens. * * * If an injury is done to them, the state is under obligation to permit them to have access to its courts for redress on the same footing as if they were citizens" (at p. 197).

"It is definitely accepted that the exercise of a state's jurisdiction over its citizens is strictly limited to territorial boundaries. Any attempt to extend the control of the state beyond those limits would be an encroachment upon the independence of another state and a serious infraction of international law. But this territorial restriction upon jurisdiction still leaves the state free to assert rights over the citizen which may be made effective if at any subsequent time the citizen should return within the boundaries of the state" (at p. 188).

D.

The holding of the Circuit Court of Appeals that a vessel is constructively a part of the territory of the sovereign whose flag she flies, is not in accord with the modern authorities and is unsound in principle.

In *Cunard Steamship Co.* v. *Mellon*, 262 U. S. 100, at page 123, this Court referred to the statement that a merchant ship is a part of the territory of the country whose flag it flies, as "a figure of speech, a metaphor."

In *Sharrenberg* v. *Dollar S. S. Co.*, 245 U. S. 122, at page 127, this Court said:

> "It is, of course, true that for the purposes of jurisdiction a ship, even on the high seas, is often said to be a part of the territory of the nation whose flag it flies. But in the physical sense this expression is obviously figurative (International Law Digest, Moore, Vol. 1, §174), and to expand the doctrine to the extent of treating seamen employed on such a ship as working in the country of its registry, is quite impossible."

These expressions of the Court are fully sustained by modern authorities. Professor Charles G. Fenwick in his work on International Law, Second Revised Edition 1934, at page 218 said:

> "This fiction of the 'exterritoriality' of vessels, while it finds expression in numerous decisions of British and American courts, has been rejected by most modern writers on the ground that, while it is a convenient explanation of the greater part of the relations which the vessel and persons on board bear to the state of the vessel's flag, it is inconsistent with other relations affecting the vessel both on the high seas and in foreign ports."

All of the cases and text writers cite Hall's discussion on the subject. (Hall on International Law, 8th Edition, edited by A. Pearce Higgins, Whewell Professor of International Law of the University of Cambridge (Oxford) 1924, Sections 76 to 78, inclusive, Part II, Chapter VI, pp. 301 to 307.) Hall

demonstrates that the historic premises on which this entire doctrine rests, are without foundation. The doctrine had its origin in the "Exposition des Motifs" put forth in 1752 by the Prussian Government in justification of its behaviour in confiscating the funds payable to its English creditors in respect of the Silesian Loan. Hall points out that this assertion was supported by no reasoning and by no precedent. He says: "In its origin therefore the doctrine had just so much authority as belongs to a legal proposition laid down by an advocate whose law is notoriously bad." (Hall on International Law, Eighth Edition, pp. 302, 303.) In a footnote at page 304, it appears that the doctrine has been generally rejected by modern writers:

> "The territoriality of merchant vessels is not admitted by Lampredi (Com. dei Pop. Neut. pt. i. §xi), Wheaton (Elem. pt. ch. ii.; §10), Manning (Law of Nations, p. 275, Abdy's ed.), Riquelme (i. 222). Twiss (i. §159), Fiore (pt. ii. ch. v. ed. 1868), Harcourt (Letters of Historicus, No. x), (Bonfils-Fauchille (§§616-18), Despagnet (§267)."

After referring to the writers who have entertained the contrary view, Hall says (Hall on International Law, 8th Ed., at pp. 305, 306):

> "International law indeed as laid down by these writers themselves is inconsistent with the principle which they uphold. It is admitted by the most thoroughgoing assertors of the territoriality of merchants vessels that so soon as the latter enter the ports of a foreign state they become subject to the local jurisdiction on all points in which the interests of the country are touched; that when a vessel or some one on board has infringed the local laws she can be pursued into the open seas, and can be brought back, or the culprit can be arrested there; that in time of war a merchant ship can be seized and condemned for carriage of contraband or breach of blockade. Now it was long ago pointed out that if a merchant vessel is part of the territory of her state she must always be part of it. The fiction is meaningless unless it conveys that a merchant ship is clothed with the characteristic attributes of territory, and among these are inviolability at all times and under all circumstances short of a pressing necessity of self-preservation on the part of another power than that to which the

territory belongs, and exclusiveness of jurisdiction except in so far as it is abated by the custom of exterritoriality, which of course cannot be brought into use as against a ship. This however the fiction does not convey. Under the confessed practice of nations the alleged territorial character disappears whenever foreign states have strong motives for ignoring it. It cannot be seriously argued that a new and arbitrary principle has been admitted into law so long as a large part of universally accepted practice is incompatible with it, and while at the same time its legal character is denied both by important states and by jurists of weight.

§77. Putting aside the fiction of territoriality as untenable, it may be taken for granted that the jurisdiction exercised by a state over its merchant vessels upon the ocean is conceded to it in virtue of its ownership of them as property in a place where no local jurisdiction exists; this being a reasonable theory, and the only one which enters into competition with the doctrine of territoriality. It only remains therefore to see what are the limits of the jurisdiction thus possessed. As might be expected, it is sufficient to provide for the good order of the seas, and excludes foreign jurisdiction until grave reason can be shown for its exercise."

In conclusion, we beg to call the Court's attention to the fact that no legal possession of the "Navemar" could be acquired by the Republic of Spain in the Argentine for the reasons given in the case of *The Cabo San Antonio* (Appendix A), and that no contention was made in any of the suggestions, or by counsel for the Ambassador of Spain, that any possession was acquired elsewhere than in the Argentine (R. 95, 101, 123). There is no suggestion that the Republic of Spain took possession of the "Navemar" while the vessel was on voyage. At the time of the bringing of this suit the vessel was already in the custody of the law (R. 250), hence she could not have been in the possession of the Republic of Spain when served with process in this suit, *The Santissima Trinidad* (*supra*), 7 Wheaton 283, at p. 355 (*supra*, p. 24). The suggestion that the master may have taken possession of her for the Republic of Spain is refuted by his own affidavit (R. 138-152). Even if he had, the circumstance

that on the day the libel was filed, Careaga attempted to relieve Martinez "from his command as master of the 'Navemar'", and to appoint another master (R. 124), clearly shows that Careaga did not regard Martinez's possession as that of the Republic of Spain. Legally, Martinez's custody was that of the owner. *The Jupiter No. 3* (1927) P. 122, at page 144.

After this suit was brought to oust the five members of the crew, none of them took any steps to defend the case, nor did Martinez assert any right of possession to the ship for the Republic of Spain. Moreover, when the District Court asked the pointblank question of counsel for the Ambassador of Spain as to when and where the Republic of Spain took physical possession, the answer was October 16, 1936 at Buenos Aires (R. 95—*supra* at p. 24). It is clear from this statement that the only taking of possession which is alleged, occurred in the Argentine, and we submit that as that act was illegal in the Argentine (*The Cabo San Antonio*,—Appendix A), it can be given no effect here.

Conclusion.

We submit that because the only subject before the Circuit Court of Appeals for review was whether or not the Spanish Ambassador should be permitted to intervene and file a claim, the Circuit Court of Appeals erred in failing to confine its decision to that subject, and in going further and directing a dismissal of the libel. Moreover, as the vessel was not in the actual possession of the Republic of Spain at any time, there is no question of immunity in the case. The real fact is the Republic of Spain is attempting to inject itself into this suit in order to use our courts for the purposes of obtaining the possession of a chattel to which its only claim is a decree of confiscation of property belonging to alien friends. It is submitted that the foregoing discussion conclusively shows that the Republic of Spain has not any proprietary interest in the "Navemar" which may be recognized by our courts. The suggestion that the decree of confiscation, plus the endorsements and letters of the Consuls, constituted tak-

ing a constructive possession, is without force, especially because one of these elements, viz., the decree of confiscation, offends on its face both the Argentine and American Law (see discussion, *supra*, at pp. 25-27 and 33-35).

The order of the Circuit Court of Appeals reversing the decision of the District Court and directing that the libel be dismissed should be reversed, and the order of the District Court denying leave to the Ambassador of the Republic of Spain to intervene in the suit, should be affirmed, with costs.

Respectfully submitted,

T. CATESBY JONES,
D. ROGER ENGLAR,
JAMES W. RYAN.

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Appendix A.

THE CABO SAN ANTONIO

There is a seal
ARGENTINE REPUBLIC
Legal Documentary Paper 1,340,474

I HEREBY CERTIFY: Having before me the action brought by YBARRA & CIA, SOCIEDAD EN COMANDITA, of Seville, Spain, on an interdict to retain or protect possession of the motorship of Spanish Flag "CABO SAN ANTONIO", before the Federal Court in charge of Dr. Eduardo Sarmiento, of which the undersigned is secretary, that having His Honor the Judge officially requested, under date of May 12, 1937, from His Excellency the Minister of Foreign Affairs and Worship, Dr. Carlos Saavedra Lamas, to send authenticated copy of the resolution dictated by that Ministry on January 14th of the same year, as the result of the steps taken by the Spanish Embassy in order to be given possession of the motorship "CABO SAN ANTONIO", by reason of having been confiscated by the Spanish Government by decree of October 3rd, 1936, the vessel being in Argentine territorial waters since the first of said month and year; His Excellency the Minister sent the copy which is literally transcribed immediately following: "Buenos Aires, January 14th, 1937.—In consideration of the decision rendered by the Legal Counselor Dr. Isidoro Ruiz Moreno, the Ministry of Marine be informed, in reply to its private communication of November 12th, last, that this Chancery, by the reasons stated, does not recognize as legal the confiscation on the part of the Spanish Government of the vessel 'CABO SAN ANTONIO' when the said vessel was anchored in Argentine territorial waters, having been decided to inform the above mentioned Government to this effect, entering the corresponding claim.—Bring the foregoing to the Ministry of Marine with the urgent request of its eventual return. Let these presents serve as a courteous note of delivery—(Signed): Carlos Saavedra Lamas. Copy.—(Signed): Oscar Ibarra García. Under-Secretary of Foreign Affairs"—

In accordance with the aforementioned procedure I issue the present which I sign and seal in the City of Buenos Aires, Capital of the Argentine Republic, this day 18th of November of 1937.——

(Signed) FELIX G. BORDELOIS
There is a stamp seal, which also appears at the margin of the first page.

I HEREBY CERTIFY that the signature immediately preceding, viz.: "FELIX G. BORDELOIS", is authentic and that of the Secretary of Federal Court of Civil and Commercial action, under my charge, and the one used by him in all his acts.— Buenos Aires, November 18th, 1937.

(Signed) EDUARDO SARMIENTO
Federal Judge
There is a stamp seal, which also appears at the margin of the first page.

The Secretary of Foreign Affairs and Worship certifies that the preceding signature, reading Eduardo Sarmiento, is authentic.——

Buenos Aires, 18th of November, 1937.

(Signed) E. OUDRY
By A. Chief of the Desk of Entries Legalizations and Deliveries
There is a stamp seal which also appears all along the border of the document.

Consulate General of the
United States of America

BUENOS AIRES, November 19th, 1937

The foregoing seal of the
Ministry of Foreign Affairs and
Worship and the signature of

E. OUDRY

are hereby certified to be
genuine

(Signed) SYDNEY H. BANASH
Vice Consul of the
United States of America

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Fee No. 38 $2.00 Equal
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There is a dry seal on a red paper seal holding down the red silk ribbon which binds the entire document.

Appendix B.

Martiarena v. *Amaliobeta and Urutia*

RECHTSKUNDIG WEEKBLAD (WEEKLY LAW GAZETTE)

7th March 1937, No. 25, 1065.

CIVIL COURT OF ANTWERP

2nd Chamber (bis) 18th February 1937.

President: A. Stellfetd. Judges: Van Mieghem and Jageneau.

Pl. R. Van de Vorst against A. Lilar.

International private law. Claiming of ships by the Spanish government. Conditions of validity in accordance with Belgian international private law.

Two ships which left a Spanish port took refuge at Antwerp. They were claimed there by their owner and chained up. Against this claim it is pleaded that they are said to be regularly requisitioned by the Spanish authorities. Is this requisition valid for Belgian law?

The judgment decides that in order that the requisition should be valid it should be proved that all formalities prescribed by the Spanish law have been duly complied with, among others, the registration in the register with serial number provided for by the law, with the making out of an inventory of the ships and the handing over of regular proof of dispossession. All other preseriptions of the Spanish law would be in conflict with Belgian public order.

Martiarena against Amaliobeta and Urutia.

Whereas the summons of commitment for trial dated the 20.10.36 extends to it being pleaded as right that the plaintiffs shall again be given possession of the ships "Alkari"

and "Lagundu" and that the defendants be ordered to evacuate these vessels;

Whereas these, favoured by political disturbances, left the port of Pasajes on 2nd September 1936 in order to moor at Antwerp, after having experienced difficulties with the competent authorities of the port of Ostend where they had put in, and to be there chained at the instance of the plaintiff;

Whereas it is no longer disputed or can be disputed that the "Alkari" and "Lagundu" are the property of the plaintiff and that the documents of ownership produced amply proved this right, the claim is therefore admissible;

Whereas the right of ownership in Spain, notwithstanding the serious events which that country is experiencing, still always remain a fundamental legal principle;

Whereas however Urutia and Amaliobeta, in order to justify the taking possession, invoke a requisition disputed by the plaintiff;

Whereas, in these circumstances, the crucial point of the action is in the examination of the validity of this claim in respect not only of Spanish law but also of Belgian international public order;

Whereas the defendants base their defence mainly on a document dated 2nd September 1936, bearing as heading "Secretariat of Guipuzcoa" and signed by the direction of the Junta and the popular front of Guipuzcoa and by the popular front of the same province, and in which it is stated that the two fishing vessels are "entrusted for the service of defence to the Basque armies of Azpeitia";

Whereas it is thus necessary to find what provisions the Spanish law affects in the present matter, and to what extent these are to be observed in order, in the case of non-application of the essential conditions of a regular requisition, to consider these as not existing and of no value;

Whereas the latest Spanish fundamental law, in art. 44, proclaims ownership and provides for dispossession of same only for reasons of public need but with fair compensation;

Whereas this principle is confirmed in the regulation made by the Ministry of War on the 21.8.1921 (Gazette of Madrid No. 237 of 25.8.21) and by application of the law of 29th June and 11th December 1918;

Whereas, moreover, every application gives right to compensation for the requisitioned objects, and after a written order given in advance (art. 4) which states the nature and duration of the operation, all of this subject to immediate issue of a written acknowledgment of receipt of the requisition;

Whereas this procedure agrees with that of all civilized countries, both in war time and in times of peace, and has found its inception in the common law of the peoples; whereas these fundamental principles cannot be interfered with by the lawful government of Valencia, as it, as custodian of legality, must be the first, even in time of civil war, to make the application thereof unassailable;

Whereas only a summons made in accordance with the stipulations of the law can give the owner of the requisitioned objects the right to obtain compensation for them, which he may rightly demand;

Whereas the Belgian courts must regard all other expropriations committed outside of the law as having been effected by force and, consequently, as in violation of the natural right of ownership proclaimed by the fundamental Belgian law, and all foreigners in the Kingdom's territory as protected against all reprisal;

Whereas it is not contended that the known declaration made by the political associations was recorded with a serial number in the register specified by the law; whereas it does not give the slightest guarantee as to the date which it bears;

Whereas no inventory of the ship was made either, nor an acknowledgment of dispossession handed over to the plaintiff, so that the latter, for the safeguarding of his rights, is exposed to all arbitrariness, and for eventual later compensation cannot invoke the least legal title;

Whereas any other declaration of the Spanish law would no longer coincide with the Belgian, and with the presence of the property in the Belgian jurisdiction, for the sake of unity of the country's legislation, no other application of this would be possible than that which would allow the plaintiff to claim his property in such circumstances;

Whereas moreover it must be set forth that for the very first time, in a previous action brought before the President

of the Commercial Court, and after pronunciation of his order dated the 27.10.36, defendants, holding the opinion that this had not yet been given, made mention for the first time of a requisition;

Whereas, in this connection, it must also be mentioned that the two captains declared at Antwerp before the Water Bailiff that they had put in there through bad weather and to wait for orders from the owner;

Whereas they were unable to produce any title of ownership of their ship, such as art. 63 of the law relating to navigation requires;

Whereas the Beglian Consul at San Sebastian telegraphed to the Ministry of Foreign Affairs at Brussels, that both ships left the port of Pasajes on 3rd September and were seized by their crew;

Whereas all these facts and declarations are peculiarly in conflict with the thesis of the plaintiffs;

Whereas, the plaintiffs indeed invoke a declaration by the Spanish embassy from which it would appear that, according to the Spanish law of 1st July 1911 (art. 47 and 65), the Ministry of Finance is not obliged in case of revolution to observe the usual legal formalities;

Whereas in this case it is a question of a legal dispute in the matter of public contracts which do not apply in the present action: whereas, moreover, the interpretation of the foreign law is for the Belgian court a question of fact subject to its sovereign judgment, and which must be in accordance with the national laws;

Whereas, therefore, and without deeper examination of the circumstances in which dispossession took place on the 2nd September, it is established from now onwards that it took place contrarily to the law, and without any observation of the least customary form of Spanish law;

Whereas the defendants invoke the decree proclaimed on the 25th July by the Spanish Government, and of which an extract through the Spanish Embassy in Brussels is to be found in the papers, but whereas this order applies only to chapter V of the law of 1st July 1911 for the administration and accountancy obligations of the public finance, and does not apply in this case;

Whereas the plaintiff rightly remarks that [they] could not put into Belgium for any military purpose, although according to the declaration of the political party "Popular Front" of Guipuzcoa, they have been requisitioned "entrusted to the Basque armies of Guipuzcoa for defence service";

Whereas the Spanish authorities, through the mouth of their representatives in Brussels, mitigated these motives by informing the Minister of Foreign Affairs of Belgium in a note that the "Alkari" and "Lagandu" intended to leave the port of Antwerp without cargo, with their papers in order, quod non, and the declaration that they had to secure provisions for Bilbao;

Whereas, from these considerations, it appears that no regular requisition existed at the moment when the said ships left Spanish waters in order to take refuge in Belgium;

Whereas the defendants invoke a telegram dated the 22nd October 1936 in which the Spanish Minister of Foreign Affairs is said to approve the requisitioning of the ships on the 2nd September;

Whereas this act of the Spanish Authorities, taking place ex postfacto cannot acquire any validity in respect of what was ab initio, in accordance with its own laws, entirely invalid, all the more so as on the date of the telegram there could be no question of a new requisition, as the ships had become beyond the dominion of the Spanish government;

Whereas, therefore, if it is asserted that an official declaration of a foreign Minister must be taken as the truth, this applies however only in as far as this declaration relates to an action in which the foreign state is itself concerned, either direct, or indirectly, quod non;

Whereas therefore the defendants are, as for themselves and theirs, without any right to the ships of the plaintiff, whereas in addition it is found that the plaintiff is the owner of the ships;

For these reasons; The Court

Declares the claim admissible and, as to the main matter, finds that the plaintiff shall be put back in possession of the ships "Alkari" and "Lagundu";

Orders the defendants to free the aforesaid ships and to leave them and to place them at free disposal within eight days reckoned from the signing of this judgment, and in case of failure by the defendants to do so, authorizes the plaintiff as from now and above all to then drive them and theirs out with movables and effects and to take proceedings publicly against the latter through the first bailiffs requested so to act;

Places on record for the defendants that, in virtue of the competence and instance, they each assess the action at more than frs. 25,000 and this in respect of each head.

Declares the judgment executable provisionally notwithstanding opposition or appeal and without security.

Orders defendant to pay costs.

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JAN 7 1938
CHARLES ELMORE CROPLEY

Supreme Court of the United States

OCTOBER TERM, 1937.

No. 242.

COMPANIA ESPANOLA DE NAVEGACION MARITIMA, S. A., Owner of the Spanish Steamship "NAVEMAR",

Petitioner,

—against—

Spanish Steamship "NAVEMAR", her engines, etc., and RAFAEL CRESPO, JOSE ARANA, MANUEL FREIRE, GASPAR LOPEZ and ANTONIO SANCHEZ,

Respondents,

(No appeal was taken by them)

FERNANDO DE LOS RIOS, Ambassador of the Republic of Spain, applicant appearing through Luis Careaga, Acting Consul General of Spain at New York, and Mr. Jesse L. Rosenberg, his counsel, to intervene and vacate a final decree so that the Ambassador might appear as claimant of the Steamship "Navemar" in this suit,

Respondent in this Court.

REPLY BRIEF ON BEHALF OF PETITIONER.

T. CATESBY JONES,
D. ROGER ENGLAR,
JAMES W. RYAN.

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The statement of facts in respondent's brief is inaccurate and contradicts the findings below, and is inconsistent with the concession made in open court by respondent's counsel in the District Court, that respondent's claimed possession was at most a constructive possession.

The statement of facts at pages 2 to 7 of respondent's brief is inaccurate and ignores and contradicts the specific findings of fact by the District Court, which have not been modified by the Circuit Court of Appeals and which are as follows:

"The question before me is whether in the present showing the moving papers meet the deficiencies which led to the denial of the former application. Exceptions are filed

by the libellant. Briefly these exceptions recite that the moving papers are insufficient in setting forth ownership by the Republic of Spain, possession by the Republic of Spain, public use or operation of the vessel by the Republic of Spain, either in Argentine or in New York, or indeed at any time or place.

Reply affidavits are filed by the libellants. Martinez, the master of the vessel, deposes that neither the Spanish Consul at Rosario nor at Buenos Aires took possession of the 'Navemar' nor did either of them inform him that they wished to take possession of the vessel or had instructions so to do. He alleges that it is the usual practice of Spanish ship masters of privately owned merchant vessels to deposit the ship's roll with the Consul on arriving at a port and receive it back before sailing, the ship's roll being merely a record of the arrivals and sailings of the vessel, together with a record of the kind of cargo carried, passengers and the signing on or enrollment of each member of the crew. The ship's roll is not a document of title nor of possession. Neither is the ship's register a document of title or possession. The register shows the flag or nationality of the vessel as determined by the place where her home port is situated. In the ordinary course of business on arrival at Rosario Martinez deposited the ship's roll with the Consul at that port, which in ordinary course would have been returned to him just before sailing. However, the Consul's office was closed for the day. He was advised by shippers of the linseed cargo at Rosario that although the cargo intended to be shipped had not all yet been loaded, it was imperative that the 'Navemar' sail at once because the water was going down in the river and she would be delayed too long if she did not sail immediately. The shippers agreed to make arrangements to deliver the rest of the linseed cargo to the 'Navemar' when she arrived at Buenos Aires and the representative of the Linea Sud-Americana, Inc., the charterer of the steamship 'Navemar', informed him that he would call at the consul's office at Rosario when it opened the next morning, to obtain the ship's roll and would send it by mail to Martinez, c/o Linea Sud-Americana, Inc., at Buenos Aires. Accordingly the 'Navemar' sailed at 5 P. M., October 23, 1936, without her ship's roll. After the 'Navemar's' return to Buenos Aires, arriving there at 2 P. M. October 24, 1936, he was informed that the Spanish Consul at Rosario had declined to deliver the ship's roll to the agent of the Linea Sud-Americana, Inc., and would deliver it only to the master of the 'Navemar'. Subsequently the Spanish Consul

General at Buenos Aires obtained the ship's register from the master and returned both it and the ship's roll to him. The master noted the endorsement thereon made by the Consul at Rosario and on the register by the Consul General at Buenos Aires. The latter said he had no instructions to make with respect to the 'Navemar' and that she should continue her voyage. Nothing was said about taking possession. The Spanish Consul General at Buenos Aires, however, did tell Martinez to notify Madrid that he was sailing and accordingly Martinez did cable the General Director of Merchant Marine at Madrid, on October 29, 1936:

'Authorized by Consul General here sail for New York. Greetings.

(Signed) Master "Navemar".'

The 'Navemar' is an ordinary commercial type freight steamer, of 9,000 tons cargo carrying capacity. Carrying a general cargo for various private shippers as a common carrier for hire, she had sailed from New York September 11, 1936. After stopping at St. Thomas, Virgin Islands, at Rio de Janeiro and at Montevideo, the vessel arrived at Buenos Aires on October 9, 1936, left on October 16th, arrived at Rosario October 17th, sailed from Rosario on October 23rd, after having been loaded at Rosario with 5800 tons of linseed in bulk shipped by private shippers to Archer-Daniels Company, a corporation of the United States, to be delivered at Edgewater, New Jersey. Again at Buenos Aires on October 24, 1936, she was loaded with more linseed for the same consignee and with 2200 tons of general cargo shipped by various other private shippers to various private consignees in the port of New York. She arrived at New York at 7 A. M. November 25, 1936, and on November 27, 1936, began to discharge her general cargo at the State Barge Canal Pier in Brooklyn. The vessel then left for Edgewater, New Jersey, and completed discharging the linseed on December 1, 1936. The freight was earned and was payable to the Linea Sud-Americana, Inc. on each and every shipment of the general cargo and on the linseed cargo and each consignee was required to pay freight to Linea Sud-Americana, Inc., before obtaining a delivery order for the cargo. The Linea Sud-Americana, Inc., is a corporation of the United States and was and is a time charterer of the 'Navemar' from the Compania Espanola de Navegacion Maritima, S. A. The time charter still had six months to run. The agents of the owner and of the time charterer in connection with her business in

New York on arrival were Garcia & Diaz, who are the agents and have been such agents of the 'Navemar' since Martinez was captain. They collected the freight from the various consignees on behalf of the time charterer on the occasion of the 'Navemar's' arrival and discharge at New York and Edgewater.

Martinez, when the 'Navemar' arrived at New York in the ordinary course of his duties went to the office of the agents of the ship in New York, Messrs. Garcia & Diaz, and reported the arrival and asked for instructions. He was told to go ahead with the discharge of the cargo in accordance with the charter and the bills of lading, and that the 'Navemar' was still under charter and would make another round voyage to Buenos Aires. Shortly thereafter he took the ship's roll to the Spanish Consul General's office in New York, also in the ordinary course of business, and deposited the ship's roll with him. He pointed out to Mr. Careaga the endorsement that had been made thereon and showed him the cables and radiograms. Mr. Careaga told him that he knew nothing about it and that he had no instructions whatsoever. Mr. Careaga said he would cable Madrid for instructions. Martinez apparently wanted a reply before beginning the discharge of the cargo. 'Then, Mr. Careaga told me to proceed unloading very slowly so that in the meantime he would be able to get some news from Madrid, to which I replied that I could not do anything like that, that the unloading would have to be completed as soon as possible and that it was not up to me to delay it, that we had to discharge as quickly as possible under contract with our consignees.'

Careaga then called the Spanish Ambassador by long distance telephone and afterwards dictated and gave Martinez a letter dated November 28, 1936, wherein it is set forth that in accordance with instructions received from the Ambassador, 'the ship of your command is from this date at the disposition of the government of the Republic and you must await new instructions from him in anything concerning future activities and give me, at the earliest possible moment, a detailed statement of the expenses of said ship such as salaries, victuals, etc., as well as a relation of the repairs of small importance that you are at the present time having effected.'

Martinez reported this to the agents of the owners who told him that Careaga's position was without legal authority and that he was to take instructions only from the owners of the ship. Accordingly he followed the instructions of the owner, the Compania Espanola de Navegacion

Maritima, S. A. and discharged the general cargo and linseed cargo as heretofore stated. Thereafter he made arrangements, acting on instructions from the owner, for repairs to be made by the Robins Dry Dock & Repair Company, which had been requested by the chief engineer of the 'Navemar'.

On December 1, 1936, while the 'Navemar' was still at the pier at Edgewater, five members of the crew approached him on board the 'Navemar' and said that they had been elected by the crew as a committee to take charge of the provisions and the pay of the crew. At 7 o'clock the next morning they left the vessel. At 8 o'clock the same morning, December 2, the 'Navemar' left the pier at Edgewater and proceeded to anchor in the anchorage grounds off Red Hook flats. Martinez then visited Careaga and told him that five men had come to him and said that they had been elected a committee of the crew and that they were asserting authority over provisions and pay which was in excess of any authority under Spanish law or regulations. Careaga said that the committee had already been to see him and he approved of it. Meanwhile Martinez learned that the repair gang from Robins Dry Dock had been prevented by the crew of the 'Navemar', on orders from the so-called committee, from making the repairs which had been ordered off the owners' instructions. Discussion with the crew developed that they said they were acting on instructions from Careaga and a Mr. Diaz. Thereupon Martinez with two members of the committee visited Careaga. Careaga informed the members of the crew that he would make arrangements for provisions to be put on the boat and for payment of the members of the crew, and that the committee would be authorized to control the question of provisions and of pay. Careaga also informed them that repairs would not be made and that anything done on board would be with the knowledge and approval of the committee and that nothing would be done without their knowledge and consent. Martinez protested.

It thus appears that all material allegations and proof are before the court. The affidavit of the Spanish Consul General adds nothing to the position heretofore assumed by him. On the contrary, it is now clear beyond peradventure that prior to the seizure of the steamship 'Navemar' in territorial waters of the United States by the committee of the crew, the steamship 'Navemar' was never in the possession of the Republic of Spain. Pressed at the argument counsel was compelled to concede that at most only a 'constructive possession' could be asserted prior to the seizure